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ZOOSK INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JUAN FLORES-MENDEZ, an individual and
AMBER COLLINS, an individual, and on
behalf of classes of similarly situated
individuals,

Plaintiffs.

V.

ZOOSK, INC., a Delaware corporation,

Defendant.

Case No. 3:20-cv-4929-WHA

**DEFENDANT ZOOSK, INC.'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR LEAVE TO AMEND
COMPLAINT**

Date: September 8, 2021

Time: 8:00 a.m.

Location: Courtroom 12, 19th Floor
450 Golden Gate Ave.
San Francisco, California

Judge: The Honorable William Alsup

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1 Plaintiffs' Motion for Leave to Amend Complaint ("Motion") should be denied as futile
 2 insofar as it relates to their claim under California's Unfair Competition Law ("UCL"). As
 3 explained in detail in Defendant Zoosk, Inc.'s ("Zoosk") Motion to Dismiss Plaintiffs' Second
 4 Amended Complaint ("MTD") filed concurrently herewith, Plaintiffs' proposed Second Amended
 5 Class Action Complaint ("SAC") does not cure the failings in their UCL claim that last January led
 6 the Court to dismiss that claim as insufficiently pled. Specifically, Plaintiffs' allegations still fail
 7 to establish standing for their UCL claim, which was the basis for the Court's dismissal of the UCL
 8 claim asserted in the First Amended Class Action Complaint ("FAC"). Moreover, even if the SAC
 9 had adequately pled UCL standing, the SAC's UCL claim nonetheless fails because Plaintiffs have
 10 not pled facts sufficient to demonstrate either that Zoosk's acts were "unlawful" or "unfair" within
 11 the meaning of the UCL or that they are entitled to the relief they seek pursuant to this claim.

12 **I. PROCEDURAL HISTORY**

13 The Class Action Complaint originally filed by Plaintiffs Juan Flores-Mendez and Amber
 14 Collins ("Plaintiffs") was brought after Zoosk confirmed a data security incident that it had
 15 suffered. Zoosk timely moved to dismiss Plaintiffs' complaint under Rule 12(b)(6). (ECF No. 29).
 16 Rather than opposing Zoosk's motion to dismiss, Plaintiffs filed the FAC, making a handful of
 17 small changes to their original complaint. (ECF No. 46). In turn, Zoosk moved to dismiss the
 18 FAC, on largely the same bases as in its first motion, because Plaintiffs still failed to state a claim
 19 for relief. (ECF No. 51). Following briefing and argument on Zoosk's motion to dismiss the FAC,
 20 the Court dismissed the FAC's UCL claim, among others, but granted Plaintiffs leave to amend.
 21 (ECF No. 61). Nearly six months later, on July 28, 2021 – the last day to seek leave to do so per
 22 the Stipulation and Order Staying Case For 90 Days Due to COVID-19 Related Jurisdictional
 23 Discovery Delays (ECF No. 61)¹ – Plaintiffs filed the SAC (ECF No. 77) and the Motion (ECF No.
 24 78). Among other changes, the SAC proposes to amend the FAC's dismissed UCL claim in the
 25

26 ¹ Plaintiffs contend that the Court's January 30, 2021 Order (ECF No. 61) granted leave for
 27 Plaintiffs to file a Second Amended Complaint, but "out of an abundance of caution," filed this
 28 motion seeking leave to amend. Motion at 3–4. For purposes of this Opposition, Zoosk will treat
 the Motion as necessary.

1 hope of reviving that claim.²

2 II. LEGAL STANDARD

3 Pursuant to Rule 15(a)(2), a party seeking to amend its pleading after the 21-day period in
 4 which amendment by right is permissible may so amend “only with the opposing party's written
 5 consent or the court's leave.” Fed. R. Civ. P. 15(a)(2). Rule 15(a)(2) also notes that “[t]he court
 6 should freely give leave when justice so requires.” *Id.* “Although the rule should be interpreted
 7 with ‘extreme liberality,’ leave to amend is not to be granted automatically.” *Thieme v. Cobb*, No.
 8 13-CV-03827-MEJ, 2016 WL 3648531, at *3 (N.D. Cal. July 8, 2016) (James, Mag. J.) (quoting
 9 *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir. 1990)). Courts consider the following five
 10 factors to determine whether leave to amend is appropriate: “1) bad faith, 2) undue delay, 3)
 11 prejudice to the opposing party, 4) futility, and 5) any previous opportunities to amend.” *Bowler*
 12 *v. Home Depot USA Inc*, No. C-09-05523 JCS, 2010 WL 3619850, at *2 (N.D. Cal. Sept. 13, 2010)
 13 (Spero, Mag. J.) (internal citations omitted). While not all factors hold equal weight, “futility of
 14 amendment alone can justify the denial of a motion.” *Id.* (internal quotation and citations omitted).
 15 Amendment would be “futile,” and therefore unwarranted, if “it would not survive a motion to
 16 dismiss for failure to state a claim.” *Id.* (citing *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214
 17 (9th Cir.1988)); *Thieme*, 2016 WL 3648531, at *6 (“The standard to be applied is identical to that
 18 on a motion to dismiss for failure to state a claim under Rule 12(b)(6).”). Moreover, “[a] party
 19 cannot amend pleadings to directly contradic[t] an earlier assertion made in the same proceeding.”
 20 *Airs Aromatics, LLC v. Victoria's Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595, 600 (9th Cir.
 21 2014).

22 III. ARGUMENT

23 As explained in detail in Zoosk's MTD filed contemporaneously herewith, the SAC's UCL
 24 claim fails to cure the foundational issue upon which the Court dismissed the FAC's UCL claim –
 25 Plaintiffs still fail to allege facts sufficient to establish UCL standing. *See* MTD Part IV.A; Jan.
 26 30, 2021 Order re Motions to Dismiss and Request for Discovery at 7 (“plaintiffs must show that

27 ² Zoosk does not oppose any of the SAC's amendments to the FAC other than those amendments
 28 by which Plaintiffs seek to revive the FAC's dismissed UCL claim.

1 they personally lost money or property” and did not do so). Plaintiffs suggest that the SAC
 2 sufficiently pleads UCL standing because “Plaintiffs plainly allege that they lost money as a
 3 consequence of their data being accessed in the Zoosk data breach.” Motion at 8. However, the
 4 SAC’s new “lost money” allegations are merely that at some point prior to the ShinyHunters attack
 5 Plaintiff Flores-Mendez paid Zoosk for a particular Zoosk subscription service. SAC ¶ 3. Neither
 6 this new allegation nor any of the SAC’s other allegations establishes, however, that Plaintiff
 7 Flores-Mendez suffered a “loss” by reason of his alleged payment to Zoosk or that any such loss
 8 occurred “as a result of” Zoosk’s supposed UCL violation. See MTD Part IV.A. As a result, the
 9 SAC’s new payment allegation is insufficient to support UCL standing as to Plaintiff Flores-
 10 Mendez. *Id.* And as this new allegation has nothing whatever to do with Plaintiff Collins, the SAC
 11 remains just as deficient as the FAC in pleading UCL standing as to her. *Id.* Because the SAC’s
 12 UCL claim does not adequately plead UCL standing as to either Plaintiff, Plaintiffs’ proposed
 13 amendments to the FAC are futile insofar as they seek to revive the FAC’s dismissed UCL claim.

14 Setting aside the standing issue, Plaintiffs’ proposed amendments to the FAC’s dismissed
 15 UCL claim are also futile because the SAC fails to allege sufficient facts to demonstrate Zoosk’s
 16 acts were “unlawful” (MTD Part IV.B.1.) or “unfair” (MTD Part IV.B.2.) within the meaning of
 17 the UCL, and also because the SAC does not plead facts sufficient to establish that Plaintiffs are
 18 entitled to the relief they seek pursuant to this claim. MTD Part IV.C.

19 Because Plaintiffs’ proposed amendments to the FAC are futile insofar as they seek to
 20 revive the FAC’s dismissed UCL claim, the Court should deny the Motion insofar as it relates to
 21 that claim.³ *See Bowler*, 2010 WL 3619850, at *4 (denying motion seeking leave to amend
 22 complaint because plaintiff does not have UCL standing, rendering amendments to the UCL claim
 23 futile).

24 //

25

26 ³ Though Plaintiffs suggest that the Court could “defer consideration of challenges to the merits of
 27 a proposed amended pleading until after leave to amend is granted and the amended pleading is
 28 filed,” Motion at 7, such deferral is not necessary given Plaintiffs have already filed the SAC (ECF
 No. 77). The Court therefore has the requisite information at this juncture to make specific findings
 as to the futility of the SAC’s effort to revive their dismissed UCL claim.

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3 //

4 || IV. CONCLUSION

5 Zoosk respectfully requests that the Court deny the Motion insofar as Plaintiffs' proposed
6 amendments to the FAC seek to revive the FAC's dismissed UCL claim.

S || Dated: August 11, 2021

Respectfully Submitted,

/s/Douglas H. Meal

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CERTIFICATE OF SERVICE

I, Rebecca Harlow, an attorney, do hereby certify that I have caused a true and correct copy of the foregoing DEFENDANT ZOOSK, INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT to be electronically filed with the Clerk of this Court using the CM/ECF system, which generated a Notification of Electronic Filing to all persons currently registered with the Court to receive such notice in the above-captioned case.

/s/ Rebecca Harlow
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